**HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI**
**AND**
**HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY**

**Writ Petition No.18634 of 2007**

**Between:**

M/s.East India Fisheries Private Ltd.
Rep. by its Managing Director Sri P.S. Rai

... Petitioner

**And**

M/s.Vijaya Bank and another

... Respondents

**:: ORDER::**

Counsel for the Petitioner: Shri D.V. Sitharam Murthy

**September 11, 2007**

**Per G.S. Singhvi, CJ**

This is a petition for quashing order dated 6.8.2007 passed by the Debts Recovery Appellate Tribunal at Chennai (for short, 'the Appellate Tribunal') in M.A (SARFAECI) – 89/2007.

The petitioner is an industrial unit engaged in processing and exports of seafood from Visakhapatnam. It took different amounts of loan from M/s.Vijaya Bank (for short, 'the bank') between September, 1999 and April, 2001 (total amounting to Rs.4,41,50,000/- and odd). On 5.9.2002, the bank issued notice under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the Act') and called upon the petitioner to pay a sum of Rs.4,72,11,455/- plus unapplied interest of Rs.1,23,67,616/- within sixty days. The petitioner challenged the notice in Writ Petition No.19895 of 2003, which was dismissed by the High Court on 5.7.2004. Thereafter, Collector and District Magistrate, Krishna issued order dated 1.10.2004 under Section 14 of the Act whereby he authorized Mandal Revenue Officer, Pamarru to take possession of the mortgaged properties of the petitioner and the unit set up by it and handover the same to the Assets Recovery Management Yard Private Limited.

The petitioner questioned the notice issued by the bank under Section 13 (2) by filing a petition under Section 17 of the Act. Initially, the same is shown to have been registered as Appeal No.79 of 2004, but now it is numbered as S.A.No.79 of 2004 and is pending before Debts Recovery Tribunal, Visakhapatnam (for short, 'the Tribunal').

During the pendency of the petition filed under Section 17 of the Act, the petitioner filed miscellaneous applications for stay of further proceedings and appointment of Advocate Commissioner to inspect his assets by alleging that on account of negligence of the bank and

its agent, the condition of the assets of which possession was taken pursuant to order dated 1.10.2004 passed by Collector and District Magistrate, Krishna, has deteriorated. By an order dated 20.9.2006 passed in I.A.No.207 of 2006, the Tribunal appointed Shri P.V. Chalapathi, Advocate as Commissioner and directed him to take assistance of technically qualified persons and to note down the physical features and conditions of the machinery lying in the factory. The Advocate Commissioner submitted report dated 2.11.2006 (Ex.P.7). The petitioner and the bank filed objections to the report of the Advocate Commissioner, which are pending consideration. The petitioner also filed an application under Order 16 Rule 1 of the Code of Civil Procedure for summoning the following persons:

1) Shri P.V. Chalapathi, Advocate
2) Shri K. Leela Prasad, Engineer, Subhadra Engineering Enterprises
3) The Officer in Charge, Marine Products Export Development Authority (MPEDA)
4) Mr.Antony Varghese (Vice-President), Sea Food Exporters Association of India (SEAI)

By an order dated 16.4.2007, the Tribunal partly allowed the application of the petitioner and permitted it to summon Sarvasri P.V.Chalapathi, K. Leela Prasad, and Antony Varghese. Paragraphs 4 and 5 of that order read as under:

"4. According to Securitisation Act and Rules stated under Rule 8(3) under the Security Interest (Enforcement) Rules 2002 that 'In the event of possession of immovable property is actually taken by the authorized officer, such property shall be kept in his own custody or in the custody of any person authorized or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

5. In view of the above Rule 8(3) of the Security Interest (Enforcement) Rules 2002 it is incumbent on the part of the bank to keep the property under proper custody to show whether the bank has taken

proper care or not in keeping the property as if it is its own. The burden is upon the appellants to prove whether the bank has taken proper care about the property or not and further the evidence cannot be shut out by this Tribunal when the appellant wants to adduce the evidence in respect of the care taken by the secured creditor and in these circumstances I feel that it is appropriate to allow the application to the extent of examining (1) Sri P.V. Chalapathi, Advocate (2) Sri K. Leela Prasad, Engineer and (3) Antony Varghese, Vice President, Sea Food Exporters Association of India. So far as the MPEDA is concerned it is the officer in charge of Marine Products Export Development Authority and it has nothing to do with the machinery etc. and therefore his examination may not be necessary in the circumstances of the case and I see no reason in allowing the application for examination of the Officer-in-charge of MPEDA and to that extent the application is dismissed and the application is allowed for summoning (1) Sri P.V. Chalapathi, Advocate (2) Sri K. Leela Prasad, Engineer and (3) Antony Varghese, Vice President, Sea Food Exporters Association of India and the expenses have to be borne only by the appellant so far as the examination of the witness is concerned. The petition is accordingly allowed."

The bank challenged the above mentioned order by filing an appeal under Section 18 of the Act, which was registered as M.A. (SARFAECI) - 89/2007. The Appellate Tribunal confirmed the permission granted by the Tribunal to the petitioner to summon Shri P.V. Chalapathi and Shri K. Leela Prasad, but reversed the same insofar as it related to summoning of Shri Antony Varghese. Paragraphs 5 and 6 of the appellate order read as under:

"5. Learned counsel for the respondents would urge in this context that examination of the said witness is necessary for showing the loss incurred by the borrowers on account of the negligence on the part of the appellant banks. However, this Tribunal is of the considered opinion that such a roving enquiry into the question of the due care and proper custody of the property after the appellants taking possession is beyond the scope of the appeal pending before the DRT. Hence, the impugned order has to be confirmed with reference to the witness 1 and 2 enumerated therein and reversed with reference to the 3rd witness referred to above.

6. As has been rightly pointed out by the learned counsel for the appellant banks, this Tribunal had already disposed of MA (SA)-2/2005 on 06-01-2005 directing the learned Presiding Officer, DRT, Visakhapatnam to dispose of the Appeal (SA-79/2004) before 31-1-2005, in any case on or

before 15-2-2005. Therefore, it is pertinent again to direct learned Presiding Officer, DRT, Visakhapatnam to examine the first 2 witnesses described in the impugned order and dispose of the appeal by not later than one month from the date of receipt of this order."

Shri D.V. Sitharam Murthy, learned counsel for the petitioner relied on Section 17(3) of the Act and Rule 8 of the Security Interest (Enforcement) Rules, 2002 and argued that the Appellate Tribunal committed a serious error by declining the appellant's prayer for permission to summon Shri Antony Varghese ignoring the fact that he could throw substantial light on the status of the machinery lying in the factory. Shri Murthy submitted that the petitioner is entitled to restoration of the assets and machinery of which possession was taken by the bank and for the purpose of assessing the damage caused on account of negligence of the bank or its agent, the examination of Shri Antony Varghese will be very helpful. He further argued that the observations made in paragraph 5 of the impugned order suggesting that the enquiry to be made pursuant to order dated 16.4.2007 of the Tribunal is rowing enquiry on the question of due care and custody of the property are totally unwarranted.

We have considered the entire matter. In our opinion, the Appellate Tribunal did not commit any error by reversing the Tribunal's order insofar as it related to examination of
Shri Antony Varghese. It is neither the pleaded case of the petitioner nor it has been argued that Shri Antony Varghese has any role to play in the matter of determination of the status of the machinery and assets of the petitioner. Therefore, his examination will be inconsequential for deciding the status of the assets and machinery of the petitioner and we do not see any reason to enable the

petitioner to prolong the proceedings of the application which is pending for over three years.

However, we find merit in the grievance made by the learned counsel that the observations contained in paragraph 5 of the impugned order on the nature of the enquiry being held for determination of the status of the assets and machinery of the petitioner is totally unwarranted. If at all the Appellate Tribunal felt that summoning of the persons by the petitioner is not justified, then it could have over-turned the order passed by the Tribunal in its entirety. However, the fact of the matter is that the Appellate Tribunal has upheld the order of the Tribunal insofar as summoning of Shri P.V. Chalapathi, Advocate and Shri K. Leela Prasad, Engineer is concerned. Therefore, there does not appear to be any justification for the critical observation made by the Appellate Tribunal about the roving nature of the enquiry being made at the instance of the petitioner.

In the result, the writ petition is disposed of with the direction that adjudication of the main petition filed by the petitioner as also the miscellaneous applications filed by it shall not be influenced by the observations contained in paragraph 5 of the impugned order.

As a sequel to disposal of the writ petition, WPMP No.23914 of 2007 filed by the petitioner for interim relief is disposed of as infructuous.

While disposing of the writ petition in the manner indicated above, we consider it proper to take note of the fact that in reply to the Court's query, Sri D.V. Sitharam Murthy, learned counsel for the petitioner made a statement that his client has already paid 50% of the total amount due to the bank.

A copy of this order be sent to the Senior Manager, Vijaya

Bank, Regional Office, Hyderabad for information. If the officer finds that the statement regarding payment of 50% of the dues by the petitioner is incorrect, then he may bring this fact to the notice of the Court by filing a miscellaneous petition.

**G.S. SINGHVI, CJ**

September 11, 2007

**C.V. NAGARJUNA REDDY, J**

svs